STATE OF MICHIGAN

COURT OF APPEALS

DIANE LAMB,

Plaintiff-Appellant,

v

UNIVERSITY MUSICAL SOCIETY,

Defendant-Appellee.

UNPUBLISHED
April 14, 2005

No. 253312
Washtenaw Circuit Court
LC No. 02-000296-NO

DIANE LAMB,

Plaintiff-Appellant,

v

REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

No. 253313
Court of Claims
LC No. 02-000058-MZ

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

In these consolidated personal injury actions, plaintiff appeals as of right from the trial court's orders granting defendants summary disposition. We affirm.

On March 19, 1999, plaintiff attended a dance performance with friends at the Power Center for the Performing Arts, which is owned and operated by defendant Regents of the University of Michigan (University). The performance was sponsored and presented by defendant University Musical Society (Society), a private organization that presents concerts and other cultural events, funded largely by ticket sales. Plaintiff left the auditorium, after being seated but before the performance began, to use the restroom. The performance began before plaintiff returned to the auditorium, and plaintiff was informed that she would not be admitted to the auditorium until intermission so as not to interrupt the performance. Plaintiff told the ushers and manager that she was suffering from a food allergy and needed the help of her friend, who was a registered nurse, to administer an injection of medicine. The ushers refused to admit her to

the auditorium or to inform the nurse of the situation. Plaintiff returned to the restroom to administer the medicine and, in the process, fell to the floor, injuring her ankle.

Plaintiff brought these two actions, alleging negligence by the ushers and auditorium staff in failing to seek the medical assistance plaintiff needed. Defendant Society moved for summary disposition under MCR 2.116(C)(10), arguing that there was no evidence that the ushers or auditorium staff were employees or agents of the Society. The trial court agreed. Defendant University also moved for summary disposition and argued that it was immune from suit under MCL 691.1407. The court agreed and dismissed the entire action.

On appeal, plaintiff first claims that the court erred in dismissing the action against defendant University because, while defendant is immune from a tort action, it is not immune from the breach of contract action pleaded in her complaint.[1] After de novo review, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCL 691.1407 provides immunity from tort liability for governmental agencies engaged in the exercise or discharge of a governmental function. As a public university, this broad immunity applies to defendant University. See *Harris v U of M Bd of Regents*, 219 Mich App 679, 683; 558 NW2d 225 (1996). This grant of immunity, however, does not extend to actions for breach of contract. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984).

Looking to plaintiff's complaint, we conclude that plaintiff did not plead a breach of contract claim. The elements of a breach of contract cause of action are that a contract existed between the parties and that a breach of one or more of the contractual terms occurred. See SJI2d 140.01; *American Parts Co, Inc v American Arbitration Ass'n*, 8 Mich App 156, 166; 154 NW2d 5 (1967). Plaintiff failed to plead these elements, instead pleading that the University owed her a duty that it breached, proximately causing her to suffer damages, i.e., the elements of a tort action. Moreover, plaintiff averred that she purchased the ticket from defendant Society, thereby precluding the existence of a contract between plaintiff and defendant University based on the sale of the ticket. Accordingly, because plaintiff failed to plead in avoidance of governmental immunity, the trial court properly dismissed her action against defendant University.

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[1] Plaintiff also states that the court erred in "giving that claim any substantive consideration." According to the record, the court dispensed with oral argument when plaintiff failed to file a brief in response to defendant's motion in a timely fashion. It is conceivable that at the time of the court's decision, the court was not aware of plaintiff's assertion that her claim constituted a breach of contract action. However, plaintiff moved for reconsideration of this decision, and briefed this argument. Though the court found no error in its initial decision, such a determination was made with the benefit of being advised of plaintiff's argument. Accordingly, we find no merit to plaintiff's assertion that the court failed to substantively consider plaintiff's argument.

Plaintiff next argues that the trial court erred in dismissing the action against defendant Society because a genuine issue of material fact existed as to whether the ushers were the apparent agents of the Society. We disagree.

In her complaint, plaintiff averred that the ushers were the actual agents of defendant Society. Because plaintiff failed to proffer evidentiary support for this allegation, the court granted defendant Society summary disposition. On appeal, plaintiff asserts her theory that the ushers were apparent agents of defendant Society. However, plaintiff never pleaded this theory in her complaint. Further, even if such an allegation was pleaded, there appears to be a lack of evidentiary support for it.[2] Rather, by plaintiff's own deposition testimony, she had the impression that the ushers were the employees of defendant University, not defendant Society, and there is no evidence that the ushers held themselves out as employees of the Society.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[2] To establish a claim for vicarious liability based on apparent or ostensible agency plaintiff must have the reasonable belief that the individual was an agent of the principal sought to be charged and the plaintiff's belief must have been generated by some act or neglect of that principal. *Little v Howard Johnson Co*, 183 Mich App 675, 683; 455 NW2d 390 (1990).